

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1118-CR

Cir. Ct. No. 2010CF2423

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN D. PATRICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Sean D. Patrick appeals a judgment convicting him of second-degree reckless homicide by use of a dangerous weapon. He also appeals an order denying his motion for resentencing. Patrick argues that he is

entitled to resentencing because the circuit court relied on inaccurate information when it imposed his sentence. We affirm.

¶2 “A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant seeking resentencing due to the circuit court’s use of inaccurate information must show by clear and convincing evidence that the information was inaccurate and the circuit court actually relied on the inaccurate information when imposing its sentence. *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. “Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo.” *Tiepelman*, 291 Wis. 2d 179, ¶9.

¶3 Patrick contends that he is entitled to resentencing because the prosecutor incorrectly informed the circuit court during his sentencing hearing that he had been convicted of robbery, a felony, on December 31, 1999. The State concedes that this assertion was incorrect; Patrick had only one prior adult felony conviction, recklessly endangering safety in 1993. After reviewing the State’s incorrect assertion in the context of the entire sentencing hearing, however, we conclude that Patrick is not entitled to relief because he cannot show that the circuit court relied on the inaccurate information in imposing his sentence.

¶4 At the beginning of the sentencing hearing, the prosecutor recounted Patrick’s lengthy juvenile and adult record to the circuit court, incorrectly stating that Patrick had a robbery conviction from December 31, 1999. Later in the hearing, the circuit court addressed Patrick:

THE COURT: You have an explanation as to why you, a convicted felon three or four times over, had a gun when you are not supposed to have a gun? Do you have an explanation for that?

THE DEFENDANT: What do you mean three or four times over?

THE COURT: How many times have you been convicted of a felony?

THE DEFENDANT: One time, 17 years ago.

The circuit court then began to recount Patrick's prior record to clarify it with him.

THE COURT: I have an operating [a] motor vehicle without owner's consent as a juvenile.

THE DEFENDANT: Them are all juveniles.

THE COURT: They are all felonies.

THE DEFENDANT: I never knew that.

THE COURT: I am telling you now and I am sure the judge at the time you were adjudicated delinquent told you they were felonies. So I have got two or three of those, *I have a robbery as a juvenile*, I have an endangering safety by use of a dangerous weapon, a reckless endangering—maybe the endangering safety by use of a dangerous weapon is a misdemeanor—if so, I will apologize. But we have the RES [recklessly endangering safety] from 93, that is a felony. So why did you have a gun in the first place when you are not supposed to have a gun?

(Emphasis added.)

¶5 This exchange shows that Patrick informed the circuit court that he had only one adult felony conviction and the circuit court clarified Patrick's criminal history with him on the record. After this exchange, the circuit court was aware that the robbery was from Patrick's juvenile record and Patrick's adult record included multiple misdemeanors, but only one felony conviction for recklessly endangering safety in 1993. Therefore, Patrick cannot show that the

circuit court *relied* on the prosecutor's incorrect statement that he had a 1999 conviction for robbery in framing its sentence.

¶6 Patrick next contends that he was sentenced based on inaccurate information because the prosecutor stated at sentencing that the shooting “appears to be pretty close to ... [an] execution” and stated that Patrick shot the victim at “very close range.” Assuming for the sake of argument that these statements are inaccurate because they overstate Patrick's proximity to the victim when Patrick shot him, Patrick cannot show by clear and convincing evidence that the circuit court relied on these statements in sentencing Patrick. To the contrary, the circuit court explicitly stated in its sentencing remarks that the shooting was *not* an execution, noting that it had asked the prosecutor if the bullet wound on the victim's right temple had stippling—gunpowder marks around a wound indicative of being shot at close range—but the prosecutor had stated that there was no stippling. Therefore, we reject Patrick's argument that the circuit court relied on erroneous information in sentencing him.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

